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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JESSIE TAPIA CORTES,<br><br>Defendant and Appellant. | B293520<br><br>(Los Angeles County Super. Ct. No. VA148092) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed; remanded with directions.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, William H. Shin and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Jessie Tapia Cortes appeals from a judgment entered after a jury convicted him of the attempted second degree robbery (Pen. Code,[1] §§ 211, 664) of loss prevention officer Francisco Manuel Serrano in connection with a physical altercation Cortes had with Serrano after Cortes attempted to leave a shoe store with two pairs of new shoes. On appeal, Cortes contends the trial court erred in instructing the jury not to consider self-defense. Cortes also asserts the trial court erred in refusing to instruct the jury on attempted petty theft and in instructing the jury it had to return a verdict on attempted robbery before it could return a verdict on petty theft. We affirm Cortes's conviction of attempted second degree robbery.

We also affirm the judgment entered in Los Angeles Superior Court case number VA147199 after the trial court found Cortes in violation of his probation for driving or taking a vehicle without consent (§ 10851, subd. (a)) based on the attempted second degree robbery conviction. However, we remand for the trial court to prepare a corrected abstract of judgment reflecting that the sentence on the offense of driving or taking a vehicle is to run concurrently with the sentence on the attempted robbery conviction.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Evidence at Trial*

Serrano was a loss prevention officer employed by Warehouse Shoe Sale (WSS) at its store in South Gate. Serrano testified that in the early afternoon of May 21, 2018 Cortes

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[1] All further statutory references are to the Penal Code.

entered the WSS store. Serrano greeted Cortes from his lectern near the store entrance. Cortes looked Serrano up and down and said, "What's good, bro? How you doing?" Cortes's response to Serrano's greeting "threw up a red flag" because Serrano perceived a lack of respect, so Serrano decided to keep an eye on Cortes. Serrano also observed Cortes was wearing a pair of dirty all-white Jordan athletic shoes. Serrano led Cortes to the men's shoe section of the store and then returned to his lectern, which had a monitor that displayed live security footage of the store.

Serrano monitored Cortes from his lectern, but at some point Serrano could not see him, so Serrano returned to Cortes's location to inquire if Cortes needed any help. Cortes responded, "I'm good bro." At that point Serrano noticed Cortes was wearing a new pair of Jordan shoes and holding a box with a second pair of Jordan shoes, both priced at $164.99. Cortes began walking in the general direction of the cash registers and store entrance, and Serrano accompanied him. The store had displays for infant accessories and shoes (with only left shoes displayed) located beyond the cash registers but before the store entrance.

As Cortes walked past the cash registers and approached the front door, Serrano blocked his path and told him to pay for the shoes. Cortes responded, "I'm not going to pay." Serrano extended his arms to try to direct Cortes from the exit, and Serrano tried "to smack the box away from [Cortes's] hand." Cortes backed away. Serrano told Cortes to "get back and take off his shoes," to which Cortes responded, "I'm not going to take them off."[2] Serrano told the cashier to call Oscar Cabrera, the

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[2] Serrano admitted he did not tell the police or testify at the preliminary hearing that Cortes said he was not going to pay for the shoes and he would not take the shoes off.

store manager. Serrano then put his hands on Cortes to try "to get [Cortes] back further to still try to keep him in [a] good position to see if he tries to run out, so [Serrano] could still grab ahold of him." Cortes responded, "[Y]ou can't be touching me," and he dropped the box in his hands to the floor and placed his hands on Serrano's arms.

In the ensuing scuffle, Cortes hit the left side of Serrano's face, leaving a bruise.[3] Serrano swung back, and both men ended up on the floor, with Cortes grabbing Serrano's sweatshirt. Serrano repeatedly told Cortes to take off the shoes, but Cortes did not comply.[4]

About 25 seconds after the physical altercation began, Cabrera arrived from the back of the store and stopped Cortes and Serrano from fighting. Cabrera testified he told Cortes to "put the stuff back . . . calm down[, and] [l]et's everybody just relax." Cortes then said to Serrano, "[W]atch yourself"; he told Cabrera, "[W]atch your boy." Cabrera and Serrano blocked Cortes's path to the store's entrance and told Cortes three or four times to return the shoes. Cortes then walked to the aisle to return the pair of shoes he was wearing and retrieve his old shoes, which he had left in a box. Cortes walked out of the store

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[3] A photograph of Serrano with a bruise on the left side of his face was admitted into evidence.

[4] Serrano testified Cortes told him, "Really, we're going through this struggle for some shoes?" Cortes and the People stipulated Serrano did not mention Cortes making such a statement in his testimony at the preliminary hearing.

with no merchandise, sat down outside to put on his shoes, and left. Serrano called 911 and reported the incident.[5]

B. *Jury Instructions, Verdict, and Sentencing*

The trial court instructed the jury on robbery with CALCRIM No. 1600, "To prove that the defendant is guilty of this crime, the People must prove that: [¶] (1) The defendant took property that was not his own; [¶] (2) The property was in the possession of another person; [¶] (3) The property was taken from the other person or his immediate presence; [¶] (4) The property was taken against that person's will; [¶] (5) The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND (6) When the defendant used force or fear [to take the property], he intended to deprive the owner of [it] permanently. The defendant's intent to take the property must have been formed before or during the time he used force or fear. [¶] If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery." The court also instructed the jury on the lesser included offenses of attempted second degree robbery (§§ 211, 664) and petty theft (§ 484).

Cortes's attorney requested an instruction on attempted petty theft. The trial court refused the request, explaining, "The court will not give attempted petty theft because that is not a lesser included of robbery. It's a lesser-related and it's charged that it's in the prosecution's discretion. So the court will not give an attempted petty theft."

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[5] Cortes did not testify in his own defense or call any witnesses.

The jury found Cortes not guilty of second degree robbery but guilty of the lesser included offense of attempted second degree robbery. The trial court sentenced Cortes to the upper term of three years in state prison.[6]

Cortes timely appealed.

## DISCUSSION

### A. *The Trial Court Properly Instructed the Jury That Self-defense Is Not a Defense to Robbery*

#### 1. *The jury's questions and the court's responses*

Cortes did not request an instruction on self-defense, and the trial court did not instruct on it. However, during his closing argument, Cortes's attorney argued Cortes's use of force was in response to Serrano's harassment and placing his hands on

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[6] The trial court found Cortes in violation of probation in Los Angeles Superior Court case number VA147199 for driving or taking a vehicle without consent based on his conviction of attempted robbery, and it sentenced him to 16 months in state prison. On November 8, 2018 Cortes filed a notice of appeal from the order finding him in violation of probation (B293520). On February 22, 2019 this court consolidated the appeals under case number B293520. On appeal, Cortes does not raise any issues other than the trial court's asserted instructional error at trial. However, the abstract of judgment does not reflect whether the 16-month term runs consecutively or concurrently to the three-year sentence for attempted robbery. Because the court did not specify this, under section 669, subdivision (c), the sentence runs concurrently. We remand for the court to prepare a corrected abstract of judgment reflecting that the sentence on the offense of driving or taking a vehicle is to run concurrently with the sentence on the attempted robbery conviction.

Cortes, not in furtherance of an intent to steal the shoes. During deliberations, the jury requested the "legal definition of force." In response, the trial court instructed the jury "[t]he word force, as used in these instructions, is to be given its ordinary, everyday meaning." After further deliberations, the jury notified the court it was deadlocked on the offense of robbery. When the court inquired whether there was anything it could do to assist the jury, the presiding juror responded, "[I]t's on the issue of force." The trial court stated it could not provide an additional definition of force, and it directed the jury to continue deliberating.

Later that day the jury transmitted the following question: "If force is used in the act of self[-]defense, should it be considered applicable?" Over the objection of Cortes's attorney, the trial court responded, "The defense of self defense on behalf of the [d]efendant has not been raised in this case and therefore may not be considered."[7]

2. *The trial court's duty to instruct and standard of review*

Section 1138 provides in pertinent part that if the jury "desire[s] to be informed on any point of law arising in the case, . . . the information required must be given . . . ." However,

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[7] Cortes's attorney objected to the trial court's response on the ground that although Cortes did not formally raise the legal defense of self-defense, his closing argument implicated the common usage of the word "force" because Cortes did not intend to steal the shoes or had abandoned his intent before the altercation. After the trial court provided the additional instruction to the jury, Cortes's attorney moved for a mistrial, or in the alternative, for the court to reinstruct the jury. The trial court denied both motions.

as the Supreme Court has explained, the court's duty under section 1138 to help the jury understand applicable legal principles "does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*); accord, *People v. Brooks* (2017) 3 Cal.5th 1, 97 [trial court did not abuse its discretion in refusing to elaborate on jury instruction concerning mitigation relating to death sentence].)

But the court in *Beardslee* cautioned, "[A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Beardslee*, *supra*, 53 Cal.3d at p. 97.) In *Beardslee*, the Supreme Court concluded the trial court erred by failing to consider whether it would be desirable to explain to the jury how the instruction on deliberate and premeditated murder would apply where the defendant was an aider and abettor, but the court found the error was harmless. (*Id*. at pp. 97-98.)

"We review de novo the legal accuracy of any supplemental instructions provided." (*People v. Franklin* (2018) 21 Cal.App.5th 881, 887; accord, *People v. Posey* (2004) 32 Cal.4th 193, 218 [reviewing de novo the trial court's response to a jury question].) "In reviewing a claim of instructional error, the court must consider whether there is a reasonable likelihood that the trial

court's instructions caused the jury to misapply the law in violation of the Constitution. [Citations.] The challenged instruction is viewed 'in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner.'" (*People v. Mitchell* (2019) 7 Cal.5th 561, 579 (*Mitchell*).)

3. *The trial court did not err in instructing that the defense of self-defense did not apply*

Cortes contends the trial court erred in instructing the jury not to consider self-defense because the instruction misled the jury to believe it could find Cortes guilty of attempted robbery even if he did not intend to steal at the time he used force in response to Serrano's aggressive actions. The trial court did not err.

Two aggravating factors "elevate a theft to a robbery: the use of force or fear and the taking from the victim's presence." (*People v. Gomez* (2008) 43 Cal.4th 249, 255 (*Gomez*).) A perpetrator's act of force or fear "'must be motivated by the intent to steal.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994 (*Anderson*); accord, *People v. Bolden* (2002) 29 Cal.4th 515, 556.) The force or fear element of robbery is met whether the perpetrator uses force or fear to acquire the property or to maintain possession of already stolen property while carrying it away. (*Gomez*, at p. 265; *People v. Robins* (2020) 44 Cal.App.5th 413, 419.) The latter scenario is commonly known as an *Estes* robbery, based on *People v. Estes* (1983) 147 Cal.App.3d 23, 28 (*Estes*), in which the Court of Appeal held a defendant who uses or threatens to use force when confronted by a store employee

after taking property from the store is guilty of robbery. As the *Estes* court explained, "Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Ibid*.)

Self-defense is not a recognized defense to the crime of robbery. (*People v. Costa* (1963) 218 Cal.App.2d 310, 316.) As the Supreme Court in *Gomez, supra*, 43 Cal.4th at page 264 observed, "It is the conduct of the perpetrator who resorts to violence to further his theft, and not the decision of the victim to confront the perpetrator, that should be analyzed in considering whether a robbery has occurred." Further, the law recognizes a merchant's privilege to "detain a person for a reasonable time . . . in a reasonable manner whenever the merchant has probable cause to believe the person . . . is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises." (§ 490.5, subd. (f)(1).) The merchant "may use a reasonable amount of nondeadly force necessary . . . to prevent escape of the person detained." (§ 490.5, subd. (f)(2).)

Cortes does not argue self-defense is a valid defense to robbery, instead asserting the trial court's instruction that the jury could not consider self-defense misled it to believe it could not consider whether Cortes's use of force was "'motivated by the intent to steal.'" (*Anderson, supra*, 51 Cal.4th at p. 994.) Cortes's argument is not persuasive. Cortes argues that absent the trial court's instruction, the jury might have acquitted Cortes because he never formed the intent to steal the shoes. But the jury was properly instructed that to convict Cortes of robbery, attempted robbery, or petty theft, the People had to prove Cortes had the

intent to steal. (See CALCRIM No. 1600 [robbery]), CALCRIM No. 460 [attempted robbery], and CALCRIM No. 1800 [petty theft].) For example, the trial court instructed the jury that to find Cortes guilty of attempted robbery, the People had to prove he "intended to commit robbery." The court also instructed the jury with CALCRIM No. 251, reiterating that to find Cortes guilty, the jury needed to find he committed the prohibited act "with a specific intent." There is no reasonable likelihood the jury misconstrued the court's instruction not to consider self-defense to mean the jury did not have to find Cortes intended to steal the shoes. (See *Mitchell*, *supra*, 7 Cal.5th at p. 579.)

Alternatively, Cortes contends the trial court's response might have misled the jury to find he used force or fear to take the shoes even though he had abandoned his intent to steal before encountering Serrano, relying on *People v. Hodges* (2013) 213 Cal.App.4th 531, 541-543 (*Hodges*). *Hodges* is distinguishable. There, the defendant stole items from a supermarket and was confronted by security guards in the store parking lot. (*Id.* at pp. 535-536.) During a confrontation with the guards, the defendant threw the items at one of the guards, then struck the guard with his car as he attempted to drive off. (*Ibid.*) The Court of Appeal concluded "the trial court failed to address the jury's inquiry regarding the legal impact of defendant's surrender of the goods and the relationship of that conduct to the required use of force." (*Id.* at p. 542.) The court reversed the robbery conviction because the trial court's instruction allowed the jury to convict the defendant regardless of whether he had surrendered the goods before using force. (*Id.* at pp. 543-544.)

Here, there is not substantial evidence Cortes abandoned his intent to steal the shoes before he used force against Serrano.

At the time of the physical altercation, Cortes had passed the cash registers and was headed toward the front door while wearing one pair of new shoes and holding a box for another.[8] Although Cortes dropped the box of shoes, he still had the store shoes on his feet throughout his altercation with Serrano. Even after the fight ended, Cortes only returned the shoes he was wearing after Serrano and Cabrera blocked his path to the front door and repeatedly told him to remove or pay for the shoes. On these facts, the trial court properly directed the jury not to consider whether Cortes was acting in self-defense.

B. *The Trial Court Did Not Err in Refusing To Instruct the Jury on Attempted Petty Theft*

1. *Applicable law and standard of review*

"It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury." (*People v. Booker* (2011) 51 Cal.4th 141, 181); accord, *People v. Wang* (2020) 46 Cal.App.5th 1055, 1068.) "'An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.'" (*People v. Nelson* (2016) 1 Cal.5th 513, 538; accord, *Wang*, at p. 1068.)

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[8] Although there was a display of store merchandise past the cash registers, there was no evidence (and Cortes's attorney did not argue) Cortes was intending to look at the display before paying for the shoes.

"On appeal, we review independently whether the trial court erred in failing to instruct on a lesser included offense." (*People v. Booker, supra*, 51 Cal.4th at p. 181; *People v. Wang, supra*, 46 Cal.App.5th at p. 1069.) "[I]t is axiomatic that we review the trial court's result, not its rationale." (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1494; accord, *People v. Zapien* (1993) 4 Cal.4th 929, 976 [""""No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason."""].)

A theft "requires the taking of another's property, with the intent to steal and carry it away. [Citations.] 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*Gomez, supra*, 43 Cal.4th at pp. 254-255.) "[I]f the taking has begun, the slightest movement of the property constitutes a carrying away or asportation." (*People v. Davis* (1998) 19 Cal.4th 301, 305 (*Davis*); accord, *Gomez,* at p. 255; *People v. Mireles* (2018) 21 Cal.App.5th 237, 242.) In *Davis*, the defendant was convicted of petty theft for trying to obtain a refund for a shirt he had not purchased. (*Davis*, at p. 303.) The Supreme Court held the defendant satisfied the requirement he take possession of the property by removing the shirt from its hanger while still in the store, and he satisfied the asportation requirement by carrying the shirt to the sales counter. (*Davis*, *at* p. 305; see *People v. Shannon* (1998) 66 Cal.App.4th 649, 654 ["[O]ne need not remove property from the store to be convicted of theft of the property from the store. [Citations.] One need only take possession of the property, detaching it from the store shelves or other location,

and move it slightly with the intent to deprive the owner of it permanently."].)

A defendant is guilty of criminal attempt of an incomplete offense if the defendant "acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere preparation . . . and . . . show[s] that the perpetrator is putting his or her plan into action.'" (*People v. Toledo* (2001) 26 Cal.4th 221, 230; accord, *People v. Nguyen* (2013) 212 Cal.App.4th 1311, 1323; see § 21a ["An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."].)

2. *The trial court did not err in refusing to instruct on attempted petty theft because there was no evidence Cortes committed attempted petty theft, but not petty theft*

Cortes contends the trial court should have instructed the jury on attempted petty theft because it is a lesser included offense of robbery. Cortes is correct that attempted petty theft is a lesser included offense of robbery, but the trial court did not err in refusing to instruct the jury on attempted petty theft because the evidence does not support a conviction for attempted petty theft, but not petty theft.

"'To determine if an offense is lesser and necessarily included in another offense . . . , we apply either the elements test or the accusatory pleading test. "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily

included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former."'" (*People v. Lopez* (2020) 9 Cal.5th 254, 269-270; accord, *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) However, "[w]hen . . . the accusatory pleading incorporates the statutory definition of the charged offense without referring to the particular facts, a reviewing court must rely on the statutory elements to determine if there is a lesser included offense." (*People v. Robinson* (2016) 63 Cal.4th 200, 207; accord, *People v. Anderson* (1975) 15 Cal.3d 806, 809.) We apply the elements test here because the information alleged robbery using the statutory language.

Attempted robbery is a lesser included offense of robbery. (*People v. Lopez* (2020) 46 Cal.App.5th 505, 522.) Attempted theft, in turn, is a lesser included offense of attempted robbery. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 53.) Therefore, under the elements test, attempted theft is a lesser included offense of robbery because all of the elements of an attempted theft are elements of robbery. (*People v. Lopez, supra*, 9 Cal.5th at pp. 269-270.)[9]

Although the trial court mischaracterized attempted petty theft as a lesser related rather than lesser included offense of

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[9] Attempted theft is also a lesser included offense of theft (see *People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1248 [an attempt offense is a lesser included offense of any completed specific intent offense]), and theft is a lesser included offense of robbery (*People v. Friend* (2009) 47 Cal.4th 1, 51). On this basis as well, attempted theft is necessarily included in the offense of robbery.

robbery, it properly refused to instruct on attempted petty theft because substantial evidence did not support giving the instruction. (See *People v. Zapien, supra*, 4 Cal.4th at p. 976 [appellate court looks at result, not reasoning]; *People v. Campbell, supra*, 23 Cal.App.4th at p. 1488 [same].) Substantial evidence at trial established Cortes removed the two pairs of new shoes from their shelves, placed one pair on his feet, and carried the other pair in a box as he walked toward the cash registers and front door. Therefore, Cortes's actions met the elements of caption (obtaining possession of the shoes) and asportation (moving the shoes from the shelves). (See *Davis, supra*, 19 Cal.4th at p. 305.) The only factual dispute was whether Cortes had the requisite intent to steal the shoes. Thus, if Cortes had the intent, he was guilty of petty theft; if he did not, he was not guilty of either petty theft or attempted petty theft. Because there was no substantial evidence from which the jury could reasonably conclude Cortes committed attempted petty theft, but not petty theft, the trial court did not err in failing to instruct on attempted petty theft. (See *People v. Nelson, supra*, 1 Cal.5th at p. 538; *People v. Dorsey* (1995) 34 Cal.App.4th 694, 705.)[10]

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[10] We recognize the jury acquitted Cortes of robbery and convicted him of attempted robbery. The caption and asportation requirements for theft and robbery are the same. (*Gomez, supra*, 43 Cal.4th at pp. 254-255.) Further, a person commits an *Estes* robbery even if he or she does not successfully escape with the items. (*Id.*, at p. 259.) Therefore, because the jury must have found Cortes intended to steal the shoes to convict him of attempted robbery, he also committed a robbery. But that does not mean Cortes was erroneously convicted of attempted robbery. "Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or

C. *The Trial Court Erred in Instructing the Jury To Return a Verdict on Attempted Robbery Before Theft, But the Error Was Harmless*

1. *The trial court's instructions*

The trial court instructed the jury with a modified version of CALCRIM No. 3517, stating, "It is up to you to decide the order in which to consider each crime and the relevant evidence. I can accept a verdict of a lesser crime only if you found the defendant not guilty of the corresponding greater crime." The court provided more specific acquittal-first instructions that treated theft as a lesser included offense of attempted robbery. The trial court summarized these instructions, "If you find [Cortes] guilty of attempted robbery, you stop. If you can't decide the attempted robbery, you let me know. [¶] If you find him not guilty of the attempted robbery, you then move to the petty theft. . . . If you find him guilty of the petty theft, that's it. [¶] If you can't decide, you let me know, he's not guilty . . . . [¶] So you start at the greater, work your way down."

2. *The acquittal-first rule and standard of review*

In *People v. Kurtzman* (1988) 46 Cal.3d 322, 330 (*Kurtzman*), the Supreme Court held that in all trials involving lesser included offenses, "the jury must acquit of the greater offense before returning a verdict on the lesser included offense,"

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attempted was perpetrated by such person in pursuance of such attempt." (§ 663; see *People v. Rundle* (2008) 43 Cal.4th 76, 138 fn. 28 ["Under section 663, a defendant can be convicted of an attempt to commit a crime even though the crime, in fact, was completed."], disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22.)

although the jury can consider or discuss the offenses in any order it chooses. *Kurtzman* established this "acquittal-first" rule as a mandatory rule of procedure but rejected a "strict" acquittal-first rule "under which the jury must acquit of the greater offense before even considering lesser included offenses." (*Id.* at pp. 329, 333-334; accord, *People v. Fields* (1996) 13 Cal.4th 289, 304; *People v. Olivas* (2016) 248 Cal.App.4th 758, 773.) "Instructions should not suggest that a not guilty verdict must actually be returned before jurors can consider remaining offenses" because "[j]urors may find it productive in their deliberations to consider and reach tentative conclusions on all charged crimes before returning a verdict of not guilty on the greater offense." (*Kurtzman*, at p. 336.)

We review a claim of instructional error de novo "and assess[] whether the instruction accurately states the law." (*Mitchell, supra*, 7 Cal.5th at p. 579.) Even if instructional error is found, "reversal is not warranted unless an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' [Citation.] This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred." (*People v. Breverman* (1998) 19 Cal.4th 142, 149 [failure to instruct sua sponte on a lesser included offense is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836]; accord, *People v. Molano* (2019) 7 Cal.5th 620, 670.)

3. *The trial court erred in instructing on the acquittal-first rule for theft as a lesser included offense of attempted robbery, but the error was harmless*

Cortes contends the trial court erred in instructing the jury it could only return a verdict on theft if it found Cortes not guilty of attempted robbery because theft is not a lesser included offense of attempted robbery. We agree, but any error was harmless.

As discussed, theft is a lesser included offense of robbery (*People v. Friend* (2009) 47 Cal.4th 1, 51), and attempted robbery is a lesser included offense of robbery (*People v. Lopez, supra*, 46 Cal.App.5th at p. 522). In some cases, one of two lesser included offenses of the same crime is a lesser included offenses of the other, but in other cases "two lesser offenses are included within the charged offense, but neither lesser offense is an included offense of the other." (*People v. Eid* (2014) 59 Cal.4th 650, 656 [felony attempted extortion and misdemeanor false imprisonment are lesser included offenses of kidnapping for ransom, but are not lesser included offenses of the other].)

This case falls in the latter category. "An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694; §§ 21a, 211.) "Under general attempt principles, commission of an element of the crime is not necessary. . . . As such, neither a completed theft [citation] nor a completed assault [citation], is required for attempted robbery." (*Medina,* at p. 694.) Because attempted robbery does not include all the elements of theft, a person can commit attempted robbery without committing theft, and therefore theft is not a lesser included offense of attempted

robbery. (See *People v. Hicks* (2017) 4 Cal.5th 203, 209 ["If a lesser offense shares some common elements with the greater offense . . . , but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense."].) Accordingly, the two related offenses "are merely siblings who have a common parent." (*People v. Orr* (1994) 22 Cal.App.4th 780, 784-785 [describing analogous relationship between voluntary and involuntary manslaughter].) Because theft is not a lesser included offense of attempted robbery, it was error for the trial court to instruct the jury with the acquittal-first rule that the jury must acquit Cortes of attempted robbery before returning a verdict on theft.

Cortes argues the error was prejudicial, because had the trial court not erroneously instructed the jury to return a verdict on attempted robbery first, the jury may well have avoided the "thorny question of force" inherent in robbery and attempted robbery and simply returned a verdict finding Cortes guilty of theft. Cortes's argument is speculative and assumes the jury did not follow the court's instructions on attempted robbery, which required the jury find Cortes intended to commit a robbery and to use force or fear to take the shoes in order to return a guilty verdict. There is no basis for Cortes's contention the jury failed to consider whether Cortes used force to commit a robbery, and the evidence is to the contrary. As discussed, Cortes's use of force occurred only after he passed the cash registers wearing one pair of new shoes and holding a box for a second pair of shoes. At that point Serrano placed his hands on Cortes and blocked Cortes's exit from the store, and in response, Cortes hit Serrano while continuing to wear the new shoes and refusing to take them off or

pay for them. It was only after Cabrera broke up the fight that Cortes returned the shoes and left the store.

The jury was instructed it could deliberate in any order, and the jury was free to return a verdict of not guilty of attempted robbery and guilty of theft if it found there was no evidence of Cortes's use of force to take the shoes.[11] It is therefore not reasonably probable Cortes would have achieved a more favorable result had the trial court not applied the acquittal-first instruction to the crime of theft as a lesser included offense of attempted robbery. (*People v. Breverman, supra*, 19 Cal.4th at p. 149.)[12]

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[11] The Supreme Court has observed that "in the abstract, an acquittal-first instruction appears capable of either helping or harming either the People or the defendant. In any given case, however, it will likely be a matter of pure conjecture whether the instruction had any effect, whom it affected, and what the effect was." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1077, fn. 7, overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Here, the trial court's acquittal-first instruction most likely benefitted Cortes because absent the instruction, the jury could have returned a guilty verdict for both attempted robbery and theft. (See *People v. Eid, supra*, 59 Cal.4th at pp. 660-661 [A defendant may be "properly convicted of two lesser included offenses . . . neither of which is included in the other"].)

[12] Cortes's argument of cumulative error also lacks merit. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 844; accord, *In re Reno* (2012) 55 Cal.4th 428, 483.) Because the trial court made at most one error, which we have found harmless, there was no cumulative error.

## DISPOSITION

The judgment is affirmed. We remand with directions for the trial court to prepare a corrected abstract of judgment reflecting that the 16-month sentence on Cortes's conviction of driving or taking a vehicle without consent runs concurrently with the three-year sentence for attempted robbery. The trial court is further directed to forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

FEUER, J.

We concur:

PERLUSS, P. J.

SEGAL, J.